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No. 02-1117

In The
Supreme Court of the United States

MICHAEL SHANE DAVIS AND
HEATHER N. DAVIS,

Petitioners,

v.

SOUTHERN ENERGY HOMES, INC.,
a corporation,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err when it concluded that petitioners had failed to establish that Congress intended the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, to override – and therefore partially repeal – the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which makes the arbitration agreement between petitioners and respondent "valid, irrevocable, and enforceable."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Southern Energy Homes, Inc. hereby discloses that it has no parent corporation and that no publicly held company holds ten (10%) percent or more of its stock.

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BRIEF OF RESPONDENT IN OPPOSITION

Southern Energy Homes, Inc., ("Southern") respectfully opposes the petition for writ of certiorari. The Court of Appeals held that the Magnuson-Moss Warranty Act ("Warranty Act") does not prohibit binding arbitration of petitioners' dispute with Southern. Petitioners acknowledge that in reaching this conclusion the Court of Appeals utilized this Court's test for determining whether a federal statute prohibits arbitration. They ask this Court to grant their petition to correct the Court of Appeals' alleged "error" in applying that test in this case. Pet. 3. However, even if the Court of Appeals erred in applying this Court's test – and it did not – that fact alone is not a sufficient reason for this Court to grant review. Indeed, this Court should deny the petition. The Court of Appeals' decision is in accord with the decisions of every federal appellate court and state supreme court to resolve the issue. The decision is also correct and fully consistent with this Court's precedent. Finally, and in any event, this case is not a proper vehicle to explore the issues petitioners wish to raise because any consideration of the question presented may well become moot.

STATEMENT

In October 1999, petitioners purchased a mobile home manufactured by Southern. In connection with the sale, Southern extended petitioners a written warranty on the home, which included an agreement to submit all disputes to binding arbitration. Pet. App. 51-53. Petitioners signed an additional arbitration agreement with Southern on October 12, 1999. It is identical in all material respects to the agreement in the warranty.

In contravention of their agreements to arbitrate any dispute, petitioners filed a lawsuit in the Circuit Court for Lowndes County, Alabama, alleging breach of express and implied warranty and violations of the Warranty Act, among other claims. Southern removed the case to the United States District Court for the Middle District of Alabama, and filed a motion to dismiss or, in the alternative, to compel arbitration under the Federal Arbitration Act ("FAA"), which makes arbitration agreements "valid, irrevocable, and enforceable." In response, petitioners argued that the Warranty Act overrides the FAA and prohibits binding arbitration of their claims. They also raised a host of other, unrelated challenges to the enforceability of the arbitration agreement. The district court denied Southern's motion, holding that the Warranty Act prohibits arbitration of written warranty claims. Pet. App. 29-30. The court did not address petitioners' other arguments regarding enforceability of the arbitration clause.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed. The Court of Appeals explicitly applied the test announced in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), for determining whether a subsequent act of Congress repeals and overrides the FAA. Pet. App. 9 ("we follow the Supreme Court's *McMahon* test") (published at *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)). Examining in detail the text, legislative history, and purposes of the Warranty Act, the court found no evidence of a congressional intent to override the FAA and prohibit binding arbitration of Warranty Act claims. *Id.* 9-17. Indeed, the court noted, neither the text of the Warranty Act nor its legislative history "mention[s] either binding arbitration or the FAA." *Id.* 10. Nor did the court find any inherent

conflict between the Warranty Act and the FAA. *Id.* 15. Accordingly, the court concluded that the Warranty Act "permits the enforcement of valid binding arbitration agreements within written warranties." *Id.* 6.

After reaching this conclusion, the Court of Appeals turned to petitioners' alternative argument that the court should defer to the Federal Trade Commission's ("FTC") regulations, which purport to interpret the Warranty Act to preclude binding arbitration. *Id.* 17-23. Applying the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that the FTC's regulations were unreasonable because they were based on an impermissible construction of the statute. Thus, the court declined to defer to the FTC's construction of the Warranty Act. Pet. App. 23.

Petitioners filed a timely petition for rehearing and rehearing en banc, which the Court of Appeals denied without opinion on November 14, 2002. Pet. App. 31-32. Petitioners did not seek a stay in the Court of Appeals pending the filing of their petition. Therefore, the case was returned to the district court, which is proceeding forward with the case. Petitioners have now once again asked the district court to deny enforcement of the parties' arbitration agreement, this time on the basis of the other grounds previously presented to the court. *See* Plaintiffs' Brief in Opposition to Southern's Motion to Compel Arbitration/Dismiss, *Davis v. Southern Energy Homes, Inc.*, No. 01-F-415-N (M.D. Ala. Jan. 10, 2003). As of the date of this opposition, there has been no ruling by the district court on petitioners' claims.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for several reasons. *First*, the decision of the Court of Appeals does not conflict with any decision of this Court, or of any other court of appeals or state supreme court. Although earlier district court and lower state court decisions had reached inconsistent results, recent developments (including the decision in this case and a decision from the Fifth Circuit), have brought a remarkable degree of uniformity and consistency to the case law. Today, every federal appellate court and state supreme court to consider the question has reached the same conclusion: the Warranty Act does not override the FAA and does not prohibit binding arbitration of consumer warranty claims. There is no reason for this Court to grant review of a petition founded entirely on a claim of error correction.

Second, this case presents a poor vehicle for considering whether the Warranty Act precludes binding arbitration because petitioners continue to argue before the lower courts that the arbitration clause is unenforceable on grounds independent of the question presented by the petition. Should petitioners succeed on any of their arguments, this Court's consideration of whether the Warranty Act permits binding arbitration would become moot.

Third, in any event, the Court of Appeals' decision is correct. Under the FAA, courts must "rigorously enforce agreements to arbitrate," even when faced with statutory claims. *McMahon*, 482 U.S. at 226 (quotation omitted). This presumption in favor of arbitrability of statutory claims can be overcome only if "the party opposing arbitration" proves that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at

227. Further, if Congress did intend to preclude arbitration of statutory claims, this intent must be evident in the text, legislative history, *or* "an inherent conflict between arbitration and the statute's underlying purposes." *Id.*

Applying these standards in this case, the Court of Appeals properly held that petitioners had not overcome the presumption in favor of arbitrability of statutory claims. The text of the Warranty Act does not even mention arbitration, much less prohibit it. In fact, the Warranty Act includes an express savings clause that preserves all existing rights and remedies, thus demonstrating a congressional intent to preserve parties' rights and remedies under the FAA.

The legislative history of the Warranty Act similarly fails to reveal a congressional intent to prohibit arbitration. Indeed the only relevant legislative history demonstrates that Congress knew the difference between the informal dispute settlement mechanisms ("IDSMs") authorized by the Warranty Act and arbitration, and expressly contemplated that arbitration would be available (as an alternative to litigation), if efforts through IDSMs failed. Petitioners do not cite this history, relying instead on snippets from the four-year legislative history of the Warranty Act that they claim show that Congress considered and rejected a proposal to allow binding arbitration of Warranty Act claims. But while Congress certainly considered a variety of dispute settlement procedures for the Warranty Act, petitioners found *no evidence* that Congress drafted the Warranty Act expressly to prohibit arbitration.

With no support in the text or legislative history, petitioners rely heavily on an FTC regulation which purports to prohibit binding arbitration of Warranty Act

claims. As this Court recently emphasized, however, administrative policy preferences cannot overrule prior acts of Congress. *FCC v. NextWave Pers. Communications Inc.*, 123 S. Ct. 832, 840 (2003). In any event, even if the FTC had been delegated authority to overrule a prior act of Congress – and it has not been – its views would not be entitled to deference under *Chevron* because they rest on an outmoded hostility to arbitration that has since been rejected by this Court.

I. THERE IS NO CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

Almost as an afterthought at the end of their submission, petitioners suggest that this Court should grant the petition to resolve an important conflict in the lower courts. Although the question presented is certainly an important one, petitioners fail to explain that over the last year, federal and state courts have reached essentially a uniform consensus on that question. Indeed, the pre-existing division in the lower courts has virtually disappeared in the wake of recent decisions, including the decision in this case, that together have brought a remarkable degree of consistency to the law.[1] Thus, there is

[1] The decision in this case overruled contrary district court precedent from Alabama, and the Fifth Circuit's decision in *Walton v. Rose Mobile Homes, Inc.*, 298 F.3d 470 (5th Cir. 2002) – which, like *Davis*, held that the Warranty Act permits binding arbitration – overruled contrary district court precedent from Mississippi. Although the Illinois Appellate Court held that the Warranty Act precludes binding arbitration, *Borowiec v. Gateway 2000, Inc.*, 772 N.E.2d 256 (Ill. App. Ct. 2002), the Illinois Supreme Court has accepted an appeal from that decision, which remains pending. *Borowiec v. Gateway 2000, Inc.*, No. 94235 (Ill. Nov. 2002).

no conflict to resolve because every federal appellate court and state supreme court to decide the question has held, consistent with the Court of Appeals in this case, that the Warranty Act does not prohibit binding arbitration. *Davis*, Pet. App. 2; *Walton v. Rose Mobile Homes, Inc.*, 298 F.3d 470 (5th Cir. 2002); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2000); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000); *see also Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd on other grounds*, 548 S.E.2d 342 (Ga. 2001); *Howell v. Cappaert Manufactured Hous., Inc.*, 819 So. 2d 461 (La. Ct. App. 2002).

In light of these developments, the *only* aberrant jurisdictions that still adopt the position advocated by petitioners (*i.e.*, that the Warranty Act precludes arbitration) are two federal district courts and one state trial court in Virginia, all of which issued their decisions before *Davis* and *Walton* and relied on the district court decisions expressly overruled by *Davis* and *Walton*.[2]

In search of a split in authority, petitioners seek refuge in the Mississippi Supreme Court's decision in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), but that decision does not help them. In *Parkerson*, an evenly divided Mississippi Supreme Court affirmed an intermediate appellate court's holding that the FAA did not mandate enforcement of arbitration clauses within written warranties. However, *Parkerson* is not even legally binding in

[2] *See Browne v. Kline Tysons Imports, Inc.* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107 (Va. Cir. Ct. Jan. 9, 2001).

Mississippi on this point because only four of eight Justices approved this holding; three Justices clearly rejected it and one Justice expressed no opinion on the matter. *See Buffington v. Mississippi*, 824 So. 2d 576, 580 (Miss. 2002) ("It is true that a majority of all sitting judges is required to create precedent, and therefore, it follows that a plurality vote does not create a binding result."). In any event, the *Parkerson* plurality relied on the district court decisions that have now been expressly overruled by *Davis* and *Walton*.

In sum, there is no split for this Court to resolve.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE TO CONSIDER THE QUESTION PRESENTED.

After this case returned to the district court following the Court of Appeals' decision, the district court issued an order to show cause why it should not grant Southern's motion to compel arbitration. In response to this order, petitioners filed a lengthy brief reciting various reasons why the arbitration clause is unenforceable. This brief (largely recycled from their earlier pleading in the district court) argued that the arbitration clause is unenforceable because (1) it violates various other provisions of the Warranty Act, (2) it violates the rules of the American Arbitration Association, and (3) it violates the Seventh Amendment and the Commerce Clause of the United States Constitution. Southern responded to these arguments, and these issues remain pending before the district court.

Although Southern believes that the arbitration clause is fully enforceable as written, if the district court

accepts any of petitioners' arguments, the arbitration clause would be unenforceable for reasons completely independent of the issue presented in this petition. Therefore, before this Court could even decide whether the Warranty Act prohibits binding arbitration, that issue might well become moot. In light of this possibility, this case is a poor candidate for resolving the question presented.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE WARRANTY ACT DOES NOT PROHIBIT ARBITRATION.

The central issue in this case is whether Congress in enacting the Warranty Act partially repealed the FAA, which otherwise makes all agreements to arbitrate "valid, irrevocable, and enforceable." Because implied repeal of statutes is disfavored, when – as here – "two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *NextWave*, 123 S. Ct. at 840 (quoting *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001)).

As applied in the context of the FAA, this Court has repeatedly instructed courts that they may not find that a subsequent act of Congress overrides the FAA unless Congress "*explicitly* preclude[s] arbitration" of claims under the later-enacted statute. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (emphasis added). Furthermore, the party seeking to avoid arbitration (here, petitioners) bears the burden of demonstrating that Congress clearly intended to preclude arbitration, an intent that, if it exists at all, must be found in "[the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's

underlying purposes." *McMahon*, 482 U.S. at 227 (citation omitted). Evidencing the stringent nature of these requirements, no decision of this Court holds that Congress intended a later act to repeal the FAA and prohibit arbitration.

The Warranty Act is no exception. There is nothing in the text, legislative history, or purposes of the Act that demonstrates a congressional intention to prohibit arbitration.

A. Neither the Text, Legislative History, nor Purposes of the Warranty Act Demonstrates a Clear Congressional Intent to Prohibit Arbitration.

1. The plain language of the Warranty Act does not repeal the FAA or prohibit arbitration of consumer warranty disputes. In fact, the text and stated purpose of the Warranty Act do not mention arbitration at all. In other words, nowhere in the language of the Warranty Act does Congress expressly preclude binding arbitration of consumer claims arising under the Act, or even suggest that arbitration of consumer warranty claims was a congressional concern. *See Davis*, Pet. App. 10; *Walton*, 298 F.3d at 475-76.

Indeed, a separate provision of the Act definitively repudiates any argument that Congress intended to preclude arbitration of Warranty Act claims. Section 111(b)(1) of the Act, 15 U.S.C. § 2311(b)(1), states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." Congress explicitly preserved consumers' existing rights to arbitrate claims under the FAA,

including the right to enforce arbitration agreements to which the consumer is a party. *See Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 281 (1995) (recognizing that ability to enforce arbitration agreements is an important right for consumers). This provision thus expressly negates any implied repeal of the FAA, and the rights and remedies it protects, by the Warranty Act.

Moreover, to conclude as petitioners do, that Congress foreclosed *any* arbitration remedy, a court would necessarily have to find that Congress preempted each state's adoption of the Uniform Arbitration Act, which, like the FAA, makes arbitration agreements binding and enforceable without regard to the subject matter of the parties' dispute. Principles of federalism, however, preclude a finding of preemption unless that was the "clear and manifest intent" of Congress, a standard that petitioners have not even attempted to demonstrate in this case. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 530 (2002).

Conspicuously, petitioners do not even cite the savings clause, much less point to any finding that Congress clearly intended to preempt state arbitration laws and deprive consumers of the important rights and remedies those laws provide. And for good reason. The broad savings clause of Section 111(b) makes such a finding absolutely impossible. For it expressly instructs courts *not* to interpret the statute in precisely the manner petitioners do.

In the absence of any direct language precluding arbitration and with no discussion of the savings clause, petitioners rely on three arguments to support their assertion that the Warranty Act prohibits binding arbitration. None of these arguments support their cause.

First, petitioners rely on Section 110 of the Warranty Act, 15 U.S.C. § 2310, which authorizes warrantors to create an informal dispute settlement mechanism, and argue that arbitration must fall within the scope of this new IDSM. As petitioners correctly concede, however, the Warranty Act does not define the term IDSM, Pet. 4, and thus petitioners' argument rests entirely on inferences. Yet, as this Court has repeatedly held, inference is not enough. A subsequent act of Congress does not repeal the FAA unless Congress "explicitly" precludes arbitration. *Gilmer*, 500 U.S. at 29.

In any event, petitioners' argument is meritless. Section 110 is concerned with establishment of IDSMs, not arbitration. Section 110 provides that Congress "declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms," and designates the FTC to prescribe rules "setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies." 15 U.S.C. § 2310(a)(2). The gist of the new IDSM under Section 110 is to allow a warrantor to incorporate in its written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty," in which case the consumer "may not commence a civil action (other than a class action)" under the remedies provision of Section 110(d) without first resorting to that procedure. *Id.* § 2310(a)(3)(C). *See also id.* § 2310(d)(1).

Therefore, in enacting the Warranty Act, Congress gave consumers a new statutory cause of action and provided warrantors with the option of establishing

IDSMs that consumers would need to use *before* pursuing the new remedy. However, the mere fact that Congress provided consumers with a remedy that could arise after completing an IDSM does not mean that consumers could not choose to pursue that statutory remedy in an arbitration proceeding rather than a judicial forum. Indeed, the Warranty Act's language allowing consumers to choose a *state* or *federal* forum for their disputes is consistent with the conclusion that Congress intended to allow for arbitration of consumer disputes under the Act. That is because the provision for concurrent state and federal jurisdiction reflects a congressional desire to "allow[] [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Gilmer*, 500 U.S. at 29 (second alteration in original) (quotation omitted).

Moreover, allowing warrantors to establish an IDSM that they may require consumers to resort to as a prerequisite to filing a lawsuit does not evince a congressional intent to preclude *arbitration*. For the Warranty Act speaks only of an "informal dispute settlement mechanism." As both the Third and Fifth Circuits have explained, arbitration is not the same as an IDSM. *Walton*, 298 F.3d at 476 ("binding arbitration is not normally considered to be an 'informal dispute settlement procedure'"); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3rd Cir. 1997) ("[T]he informal dispute resolution mechanism provided [by the Warranty Act] *does not constitute arbitration* within the meaning of the FAA.") (emphasis added). Furthermore, while the Warranty Act provides for an IDSM, it also states that that procedure must be used *before* filing suit in court; arbitration, however, is "generally . . . understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton*, 298 F.3d at 475-76.

The words Congress chose in Section 110 show that Congress did not equate IDSMs with arbitration, as petitioners do in this case. Section 110 refers to an "informal" process, but arbitration is a formal proceeding, complete with rules and procedures to govern the conduct of the proceedings. *See, e.g.*, American Arbitration Association, http://www.adr.org (the rules referred to in Southern's arbitration clause). Moreover, Section 110 governs only informal "*settlement*" procedures. Arbitration is not a "settlement" procedure in any ordinary sense of that word. Arbitration is a formal proceeding for the final and binding *adjudication* of a claim. The outcome, unlike a settlement, is not voluntarily agreed upon; it is decided by an independent third party after a hearing and presentation of evidence. *See Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2168 (2002). In short, unlike an IDSM, arbitration "walks, talks, and squawks very much like a lawsuit." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1873 (2002) (quoting lower court opinion).

Second, petitioners argue that because some individuals included arbitration when they used the phrase "dispute settlement procedures," this Court should infer that Congress did so as well. Like petitioners' first argument, this argument is based on inference, and inference alone. It thus fails to meet the standards enunciated in *McMahon* and *Gilmer*: a statute precludes arbitration only when it "*explicitly* precludes arbitration." *Gilmer*, 500 U.S. at 29 (emphasis added).

Moreover, the inferences actually work *against* petitioners. Congress was keenly aware of the terms "arbitration" and "alternative dispute resolution" when it enacted

the Warranty Act. Those procedures were well known and in wide use at the time of the Act's passage. Yet, notably, Congress *never* used either of those terms in the Warranty Act, clearly indicating that Congress was talking about something else. By using the new term "IDSM," rather than a broad generic term such as "ADR," Congress thus signaled that it was referring to a more limited and newly created process, wholly distinct from existing procedures such as arbitration. *See Harrison*, 111 F.3d at 351.

Third, petitioners contend that because Congress created – and regulated – IDSMs, it must have intended to preclude any other procedure, such as arbitration, that would be exempt from IDSM regulations. Pet. 7-9. This argument fundamentally misstates the standard announced by this Court for determining whether Congress intended to prohibit arbitration. Instead of asking, as directed by *McMahon*, whether the Warranty Act unambiguously and explicitly *prohibits* arbitration, plaintiffs comb through the text for evidence on whether Congress intended to *allow* arbitration. *See* Pet. 7 ("Having permitted warrantors to create [IDSMs] . . . , did Congress intend to permit warrantors to create similar procedures that are exempt from FTC regulation?").

This line of reasoning turns the analytic framework upside down. For this Court has held that statutory causes of action must be arbitrated notwithstanding the lack of *any* provision in the statute allowing arbitration. This Court has expressly and repeatedly declared that Congress does *not* demonstrate an intent to prohibit arbitration merely by providing a statutory cause of action that expressly allows an injured party to sue in a judicial forum, or by providing for an extra-judicial method of resolving claims, *Gilmer*, 500 U.S. at 26, 29; *McMahon*,

482 U.S. at 232. Indeed, in *Gilmer*, this Court held that congressional creation of an informal dispute resolution mechanism suggests that arbitration is consistent with the statutory scheme. *Gilmer*, 500 U.S. at 29. That is because the question is not – as petitioners would have it – whether Congress expressed an intent to allow arbitration, but rather whether Congress expressed an intent to prohibit arbitration.

In sum, when the correct question is asked, an analysis of the text of the Warranty Act demonstrates that Congress did not express an intent to prohibit binding arbitration of consumer warranty claims.

2. As with its text, there is not a shred of evidence in the Warranty Act's legislative history that suggests Congress intended to preclude arbitration. In fact, the relevant legislative history shows that Congress knew the difference between arbitration and IDSMs and expressly contemplated arbitration of consumer warranty claims that could not be settled informally. Senators Magnuson and Moss introduced the first version of a consumer warranty bill in 1969. In 1970, the Senate Committee on Commerce issued a report interpreting the language of this forerunner of the Warranty Act. S. Rep. No. 91-876 (1970). That Senate Report states that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances *without the aid of litigation or formal arbitration.*" *Id.* at 22-23 (emphasis added). Congress thus clearly understood that litigation and arbitration were equivalent alternatives if informal dispute *settlement* efforts failed.

Petitioners do not cite this Report, preferring instead to scour the Warranty Act legislative history for support, an undertaking that one judge has called "the legal equivalent of an archaeological dig." *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1184 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981). Based on their archaeological research, petitioners infer from scattered (and selective) comments, that Congress purportedly considered – and rejected – a proposal to allow binding arbitration of Warranty Act claims. While petitioners point to evidence that Congress considered different types of dispute settlement procedures, they point to no evidence that Congress drafted the Warranty Act to *prohibit* arbitration. Put another way, after "entering a crowded cocktail party and looking over the heads of the guests for [their] friends," petitioners came up short. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). They were unable to find even a *single* reference to a congressional intent to prohibit binding arbitration.

Under the *McMahon* test, petitioners' failure to identify any clear legislative history expressing a congressional intent to prohibit binding arbitration dooms their argument, for this Court has held that a subsequent act of Congress overrides the FAA's command to enforce arbitration agreements only when Congress "*explicitly* preclude[s] arbitration." *Gilmer*, 500 U.S. at 29 (emphasis added).

Even taking petitioners' research at face value, the fact that some people may on occasion use the phrase "dispute settlement procedures" as encompassing arbitration falls far short of the type of unambiguous evidence necessary to conclude that Congress itself intended to preclude binding arbitration. In *McMahon*, this Court set the standard for evaluating evidence of legislative history,

and it set the standard quite high. In that case, this Court upheld binding arbitration in cases arising under the Securities Exchange Act of 1934, even though the legislative history of that statute strongly suggested that Congress had intended to adopt this Court's now-repudiated holding in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration was an inadequate forum for the resolution of statutory claims. Thus, even though the Conference Report for the 1934 Act expressly stated that the "amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceedings provisions in agreements," this Court concluded that this explicit legislative history was insufficient to override the FAA. *McMahon*, 482 U.S. at 236-39. Since petitioners' legislative history evidence is considerably less clear than the explicit statement in a Conference Report that this Court found wanting in *McMahon*, it cannot, by comparison, demonstrate congressional intent to prohibit arbitration. Not surprisingly, petitioners make no attempt to reconcile their use of legislative history with the standard established in *McMahon*.

As with the text of the Warranty Act, therefore, there is absolutely no evidence from its legislative history that Congress intended to prohibit arbitration or override the provisions of the FAA. To the contrary, the only proper evidence of the Act's legislative history shows that Congress harbored no such intent.

3. Petitioners do not address the final part of the *McMahon* inquiry (whether arbitration conflicts with the Warranty Act's purposes), perhaps because it would be futile to argue that there is any conflict between arbitration and the Warranty Act's express purpose "to improve the adequacy of information available to consumers,

prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). As this Court has repeatedly reminded courts, "by agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer*, 500 U.S. at 26).

There is, in fact, "no inherent conflict between the [Warranty Act] and the FAA." *Walton*, 298 F.3d at 478. Indeed, arbitration promotes the purposes of the Warranty Act insofar as it provides consumers with a cost-effective, streamlined procedure to resolve their claims. Because the FAA and the Warranty Act are "two statutes . . . capable of co-existence," it is this Court's "duty" to regard "each as effective." *NextWave*, 123 S. Ct. at 840. That is precisely what the Court of Appeals did in this case.

B. The Court of Appeals Rightly Declined to Defer to the FTC's Unreasonable Interpretation of the Warranty Act.

Given the lack of any text, history, or purpose to support its interpretation of the Warranty Act, petitioners seize on an FTC regulation, 16 C.F.R. § 703.5, and the FTC's statements about that regulation, to argue that the Warranty Act overrides the FAA and prohibits arbitration of Warranty Act claims. Reliance on these FTC statements is unwarranted, however, because the FTC's views are irrelevant to the *McMahon* standard, and in any event, they are not entitled to any deference.

1. Although the FTC has authority to implement portions of the Warranty Act, it has no authority to interpret the Warranty Act to override the FAA. Under the *McMahon* standard, it is the intent of Congress, not an agency, that is determinative in deciding whether a subsequently enacted statute abrogates the FAA's emphatic federal policy making arbitration agreements binding, irrevocable, and enforceable. *See McMahon*, 482 U.S. at 234 n.3 (rejecting reliance on long-standing agency rule that Exchange Act precluded arbitration). Thus, the Fifth Circuit rejected reliance on the FTC's regulations, stating that "[a]n agency's regulations, promulgated pursuant to a statute, are not part of [the *McMahon*] test." *Walton*, 298 F.3d at 479. Simply put, because an agency's regulations cannot determine whether one Congress intended to override the acts of a prior Congress, they are simply irrelevant to the central question governed by the *McMahon* test.

This conclusion – that agency interpretations are irrelevant under the *McMahon* standard – is merely an application of the basic principle, recently reaffirmed by this Court in *NextWave*, that an agency may not interpret a statute to deny the clear rights provided in a different act of Congress. As this Court expressly held in *NextWave*, "administrative preferences cannot be the basis for denying respondent rights provided by the plain terms of a law." 123 S. Ct. at 840; *see Recent Case, Arbitration – Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation*, 116 Harv. L. Rev. 1201, 1205 (Feb. 2003) ("Congress cannot delegate to an agency the authority to override congressional statutes.").

Similarly, here, the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and this guarantee provides significant rights for consumers and other signatories to arbitration agreements. *See Terminix*, 513 U.S. at 281. Nevertheless, as in *NextWave*, the FTC has interpreted the Warranty Act to prohibit binding arbitration of claims arising under that Act, thereby denying consumers and warrantors their rights under the plain terms of the FAA. Because, as in *NextWave*, the Warranty Act does not *require* this interpretation, the FTC's policy preference "cannot be the basis for denying . . . rights provided by the plain terms of the law." 123 S. Ct. at 840. In short, because there is no inherent conflict between the Warranty Act and the FAA, this Court has a duty to regard each as effective, regardless of the FTC's preference to the contrary.[3] *Id.* at 840.

2. Even if the FTC's regulation were relevant to determining whether one act of Congress (the Warranty Act) overrides another act (the FAA), the Court of Appeals properly declined to defer to the FTC's views. An agency's interpretation is entitled to *Chevron* deference only if

[3] The cases cited by petitioners are not to the contrary. Pet. 22. In *United States v. Alaska*, 503 U.S. 569, 585-86 (1992), this Court expressly held that the agency's action under one statute (the Rivers and Harbors Act) *did not alter* rights or guarantees under a different federal statute (the Submerged Lands Act). Similarly, in *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), the relevant statute expressly provided that the agency's actions exempted the affected parties from all other laws. In other words, Congress expressly authorized the agency to take action that would have the effect of overriding other laws. Because the Warranty Act does not expressly authorize the FTC to override other laws, much less the FAA, *Norfolk & Western* does not help petitioners.

Congress has not spoken to the precise question at issue – if, in other words, the statute is silent or ambiguous on the topic. *Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371, 377 (2002); *see Chevron*, 467 U.S. at 843-44. But here, if the Warranty Act is silent or ambiguous regarding arbitration, then, by definition, Congress has not clearly expressed its intent to override the FAA as required by *McMahon*. *See supra* at 9-10. In short, the factual predicate for *Chevron* deference – silence or ambiguity in the statutory language – refutes any argument that Congress explicitly precluded arbitration, as required by *McMahon*, when it enacted the Warranty Act.

3. In any event, the FTC's interpretation is unreasonable. Section 703.5(j) of the FTC's regulations provides that "[d]ecisions of the [IDSMs] shall not be legally binding on any person." Although the FTC never expressly states that "IDSM" should be interpreted broadly to include all non-judicial dispute resolution processes (including arbitration), the FTC has indicated that it interprets Section 703.5(j) to preclude binding arbitration. *See* 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975). The FTC explained that it had adopted this interpretation because "[t]he Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." *Id.* In 1999, the FTC reaffirmed this original rationale, stating expressly that it "believes that this interpretation continues to be correct." 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999). The FTC further stated that its interpretation rested on the language of the Act providing that "the consumer may not commence a civil action . . . unless he initially resorts to such [informal dispute settlement] procedure." *See id.* (quoting 15 U.S.C. § 2310(a)(3)). According to the FTC, "this language clearly

implies that a mechanism's decision cannot be legally binding, because if it were, it would bar later court action." *Id.* (emphasis added).

The Court of Appeals properly held that the FTC's asserted justifications for its regulation are unreasonable because they all conflict with this Court's precedent.[4] *See Davis*, Pet. App. 19-23. The FTC's 1975 statement that arbitration might not adequately protect consumers is based on an inappropriate hostility to arbitration, and therefore an impermissible reading of the statute. As the Court of Appeals recognized, this Court "in *McMahon* . . . rejected this same hostility shown by the SEC." *Id.* 21; *see McMahon*, 482 U.S. at 234 n.3.

Furthermore, the FTC's 1999 statement that the language of Section 110 "clearly *implies* that a mechanism's decision cannot be legally binding," is similarly inconsistent with this Court's precedent. For, even if arbitration were deemed an IDSM – which defies all evidence to the contrary – mere "implication" is *never* enough to override the provisions of the FAA. *See Gilmer*, 500 U.S. at 27-33; *McMahon*, 482 U.S. at 236-38.

Finally, if it is the FTC's position that the provision of a civil remedy in Section 110(d) precludes arbitration, that rationale also cannot survive modern precedent interpreting the arbitration of statutory claims under the FAA. This Court has repeatedly rejected arguments that claims

[4] Petitioners criticize the Court of Appeals for mistakenly labeling Section 703.5(j) an "interpretive" regulation, but this minor drafting error does not undermine the court's comprehensive analysis of the FTC's regulations.

under employment discrimination laws, the federal antitrust laws, RICO, and the securities laws, all of which provide for civil actions just like Section 110(d), are not subject to arbitration. This precedent requires that Section 110 of the Warranty Act be interpreted as providing an informal, non-binding settlement mechanism to be followed by arbitration *or* a civil action if the consumer were dissatisfied with the informal settlement result. *See Gilmer*, 500 U.S. at 29.[5]

At base, the FTC and petitioners have each made the same mistake. They have failed to accept, or even acknowledge, what this Court has repeatedly emphasized about arbitration – namely, that an agreement to arbitrate does not result in a loss of substantive rights, but merely transfers a dispute concerning those substantive rights from a judicial to an arbitral forum. Because "the FTC's motive behind [those] regulation[s] is contradictory to Supreme Court rationale," the Court of Appeals properly

[5] Indeed, the basis for this interpretation of Section 110 is even more compelling here than in *McMahon* because the statute there – unlike the Warranty Act – contained a provision that expressly prohibited parties from waiving provisions of the Act. The SEC had interpreted this non-waiver provision as prohibiting pre-dispute arbitration agreements because the SEC believed such an agreement constituted a waiver of the provisions of the Act granting injured parties the right to file a civil action. This Court rejected that argument, recognizing that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

concluded that the FTC's regulations are entitled to no deference. *Davis*, Pet. App. 21.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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